

**STATE OF MICHIGAN
IN THE SUPREME COURT**

**THE PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,**

-vs-

Supreme Court No. 155172

**TREMEL ANDERSON,
Defendant-Appellee.**

**36TH District Court No. 15-055296
Wayne County Circuit Court No. 15-001051
Court of Appeals No. 327905**

**PLAINTIFF-APPELLANT'S
SUPPLEMENT TO APPLICATION FOR LEAVE TO APPEAL
ON DIRECTION OF THE COURT**

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Table of Contents

	<u>Page</u>
Index of Authorities	ii
Statement of Jurisdiction.....	1
Statement of Question Presented	2
Introduction.....	3
Statement of Facts	5
Argument	
I. In considering the function of the district court at a preliminary examination, this Court has said both that the lower court should and that it should not decide the bindover motion based on witness credibility. The correct view is that the district court should only consider credibility when a witness’s testimony either contradicts indisputable facts, or is so patently incredible or inherently implausible that it could not be believed by a reasonable juror. Therefore, this Court should grant leave in order to adopt a standard similar to the <i>Lemmon</i> standard for preliminary examinations.	8
Standard of Review.....	8
Discussion.....	9
A. The district court abused its discretion in dismissing the charges in this instance.....	9
B. There is no constitutional right to a preliminary examination, it is a statutory creation.....	10
C. The purpose of the preliminary examination is not to resolve factual issues but merely to weed out groundless and unsupported charges.....	11
D. The deference shown to the facts when ruling on a motion for a directed verdict is the same that should be shown at a motion for bindover.....	15
E. The examining magistrate must leave questions of fact for the jury and draw reasonable inferences favorable to the prosecution.....	17

Table of Contents (Cont.)

F. Several Other States Use a Directed Verdict Standard for the Preliminary Examination.....	18
G. The <i>Lemmon</i> Standard Informs the <i>Hampton</i> Standard if there are Credibility Determinations to be made.....	24
II. The court rules dictate that the circuit court has jurisdiction over an appeal as of right filed by the prosecution from a final judgment of the district court and, therefore, the court does not have the discretion to simply deny leave to appeal. Here, the circuit court denied the People’s appeal via an order without providing an oral or written opinion. Therefore, because the circuit court did not follow the applicable court rule, the court abused its discretion in simply dismissing the People’s appeal.....	29
Relief Requested	31

INDEX OF AUTHORITIES

<u>CASE</u>	<u>PAGE</u>
<u>Federal Court Cases</u>	
<i>Gerstein v Pugh et al.</i> , 420 US 103 (1975).....	10
<i>Jackson v Virginia</i> , 443 US 307 (1979).....	16
<i>Koon v United States</i> , 518 US 81 (1996).....	8
<i>US v Carter</i> , 720 F 2d 941 (7th Cir. 1983)	16
<u>State Court Cases</u>	
<i>Matter of Buckner</i> , 92 Mich App 119 (1979).....	12
<i>Commonwealth v Marti</i> , 779 A 2d 1177 (2001)	21
<i>Hunter v District Court</i> , 190 Colo 48 (1975)	26, 27
<i>Myers v Commonwealth</i> , 363 Mass 843 (1973)	19, 21
<i>People v Asta</i> , 337 Mich 590 (1953)	11
<i>People v Babcock</i> , 469 Mich 247 (2003)	8
<i>People v Bautista</i> , 223 Cal App 4th 1096 (2014)	25
<i>People v Bowyer</i> , 108 Mich App 517 (1981).....	16

INDEX OF AUTHORITIES (CONT.)

<u>CASE</u>	<u>PAGE</u>
<i>People v Carlin (On Remand),</i> 239 Mich App 49 (1999).....	8, 12, 13, 15
<i>People v District Court,</i> 926 P 2d 567 (Colo. 1996).....	20, 21
<i>People v Doss,</i> 406 Mich 90 (1979)	passim
<i>People v Duncan,</i> 338 Mich 489 (1972)	11, 15
<i>People v Fry,</i> 92 P 3d 970 (Colo. 2004).....	26
<i>People v Giovannini,</i> 271 Mich App 409 (2006).....	8
<i>People v Glass,</i> 464 Mich 266 (2001)	15
<i>People v Goecke,</i> 457 Mich 442 (1998)	11
<i>People v Hampton,</i> 407 Mich 354 (1979)	16, 24
<i>People v Henderson,</i> 282 Mich App 307 (2009).....	29
<i>People v Herbert,</i> 444 Mich 466 (1993)	16
<i>People v Hudson,</i> 241 Mich App 268 (2000).....	8
<i>People v King,</i> 412 Mich 145 (1981)	passim

INDEX OF AUTHORITIES (CONT.)

<u>CASE</u>	<u>PAGE</u>
<i>People v Lemmon</i> , 456 Mich 625 (1998)	passim
<i>People v Oster</i> , 67 Mich App 490 (1976).....	13
<i>People v Ramirez</i> , 30 P 3d 807 (Colo, 2001)	26
<i>People v Yost</i> , 468 Mich 122 (2003)	3, 8, 17
<i>State v Blunt</i> , 751 NW 2d 692 (ND 2008)	26
<i>State v Clark</i> , 20 P 3d 300 (Utah, 2001)	23
<i>State v Dunn</i> , 117 Wis 2d 487 (1984)	22
<i>State v Hull</i> , 363 Wis 2d 603 (2015)	22
<i>State v Pledger</i> , 896 P 2d 1226 (Utah, 1995)	26
<i>State v Schaefer</i> , 308 Wis 2d 279 (2008)	22
<i>State v Virgin</i> , 137 P 3d 787 (Utah, 2006)	26
<i>State v Wilson</i> , 267 Kan 530 (1999)	20
<i>Wrenn v Sheriff, Clark County, Nevada</i> , 87 Nev 85; 482 P 2d 289 (1971)	23

INDEX OF AUTHORITIES (CONT.)

<u>CASE</u>	<u>PAGE</u>
<u>Statutory Authorities</u>	
1961 PA 236	11
MCL 600.8501	11
MCL 600.8511.....	11
MCL 750.82.....	5, 10
MCL 750.83.....	5
MCL 750.227.....	5, 10
MCL 750.227b.....	5
MCL 766.1	10
MCL 766.4.....	11
MCL 766.13.....	9
MCL 780.227b.....	10
<u>State Rules and Regulations</u>	
MCR 2.613(C)	8
MCR 7.103(A)(1)	29
MCR 7.114(B)	29
MCR 7.305(H)(1)	1
<u>Other Sources</u>	
69 Washington University Law Review 159.....	18
18 UCLA Law Review 636.....	18

STATEMENT OF JURISDICTION

This Court has jurisdiction to order supplemental briefing by virtue of MCR 7.305(H)(1).

STATEMENT OF QUESTIONS PRESENTED

- I. In considering the function of the district court at a preliminary examination, this Court has said both that the lower court should, and that it should not, decide the bindover motion based on an evaluation of witness credibility. The correct view is that the district court should only consider credibility when a witness's testimony either contradicts indisputable facts, or is so patently incredible or inherently implausible that it could not be believed by a reasonable juror. Therefore, should this Court grant leave to appeal in order to adopt a standard similar to the *Lemmon* standard but for preliminary examinations?

The People answer: "Yes."

The Defendant answers: "No."

The lower court did not answer this question.

- II. The court rules dictate that the circuit court has jurisdiction over an appeal as of right filed by the prosecution from a final judgment of the district court and therefore the court does not have the discretion to deny leave to appeal. Here, the circuit court denied the People's appeal via an order without providing an oral or written opinion. Therefore, because the circuit court did not follow the applicable court rule, did the circuit court abuse its discretion in simply dismissing the People's appeal?

The People answer, "Yes."

The Defendant answers, "No."

The lower court did not answer this question.

INTRODUCTION

The Court itself has recognized that there is a conflict between the holdings in *People v Doss* and *People v King*, but has yet to resolve this conflict.¹ *People v Doss* held that the object of a preliminary examination is not to prove guilt or innocence beyond a reasonable doubt and where evidence conflicts or raises a reasonable doubt as to the defendant's guilt, such questions should be left for the jury to decide.² In contrast, *People v King* held that it is the magistrate's duty to pass on the credibility of witnesses and on the weight and competency of evidence.³

Indeed, *People v Yost* recognized the tension between the idea that a magistrate can assess the credibility of witnesses and the principle that a magistrate should not refuse to bind over a defendant merely because the evidence conflicts or raises a reasonable doubt as to the defendant's guilt.⁴ The *Yost* court did not resolve this question, however, and courts have continued to struggle to properly apply these two divergent principles. Therefore, in order to aid courts in the future, the proper resolution is that the examining court should apply a standard akin to the *Lemmon* standard when evaluating testimony following a preliminary examination.⁵

¹ See *People v Yost*, 468 Mich 122, 128, n 8 (2003): "There is some tension between these two principles. However, we find no need to clarify the interplay between these two principles in this opinion."

² *People v Doss*, 406 Mich 90 (1979).

³ *People v King*, 412 Mich 145 (1981).

⁴ *People v Yost*, 468 Mich 122 (2003).

⁵ "[U]nless it can be said that directly contradictory testimony was so far impeached that it was deprived of all probative value or that the jury could not believe it, or contradicted indisputable physical facts or defied physical realities, the trial court must defer to the jury's determination." *People v Lemmon*, 456 Mich 625, 645-646 (1998). Of course the portion of the *Lemmon* opinion that holds that a new trial is granted if the case is marked by uncertainties and discrepancies would be inapplicable to the preliminary examination scenario.

That is, a district court should only refuse to bind over a defendant when no reasonable juror could believe the facts presented.

STATEMENT OF FACTS

The Defendant was charged with assault with intent to murder,⁶ carrying a concealed weapon,⁷ felonious assault,⁸ and felony firearm.⁹ On December 24, 2014, at around 11:30 p.m., the Defendant was driving the victim, Michael Larkins, to his home via the Lodge Freeway through the City of Detroit.¹⁰ The victim and the Defendant had dated previously and had a one-month-old child together.¹¹ The Defendant became angry with the victim over Christmas gifts for her son and started yelling at him.¹² While still driving the car the Defendant pulled a black handgun from between her thighs and pointed it at the victim.¹³ The Defendant threatened to kill him and said no one would believe him if he reported her.¹⁴ The Defendant drove in this manner for about five minutes before pulling off the freeway and stopping the vehicle.¹⁵ Once she stopped the vehicle she pointed the gun and tried to shoot the victim but the gun did not discharge.¹⁶ The victim scrambled out of the car and began to run across Puritan Street. As he was running he heard the Defendant's gun fire three times behind him.¹⁷ He was not hit by any of the bullets.¹⁸

⁶ MCL 750.83.

⁷ MCL 750.227.

⁸ MCL 750.82.

⁹ MCL 750.227b.

¹⁰ PE, 18.

¹¹ PE, 5, 8.

¹² PE, 7.

¹³ PE, 9-10, 12.

¹⁴ PE, 8.

¹⁵ PE, 13.

¹⁶ PE, 14.

¹⁷ PE, 27.

¹⁸ PE, 15.

The Defendant called the police and the victim screamed for help so the Defendant hung up the phone.¹⁹ The Defendant threw the victim's clothes and coffee mug into the street and then drove away.²⁰ The victim used a neighbor's telephone to call the police.²¹

The district court dismissed the case at the conclusion of the preliminary examination. The district court explained:

THE COURT: ...well, let me tell you what my issue are so we can go straight to the point, huge issues with credibility. This young man wants me to believe that somebody had a gun on him; they pulled the car over; he asked to get out; but he wanted his Christmas gifts.

He is afraid because this person threatened to kill him and they're pointing a gun at him but he wants to get his Christmas gifts for his family. I don't [sic] any testimony about a handgun. If I don't believe this witness, if I find him to not be credible, which in a preliminary examination, I have to determine the credibility of the witness.

You've put on no witness to tell me that there was a handgun recovered. You've put on no witness to tell me that there was some spent casings, shell casings were recovered.

There's no witness, other than this young man, who is just all over the place everywhere and although he's claimed that this gun was pulled out, I'm just going to tell you, I am having a hard time believing that his life was at stake and we have no tape of the 911 call that supports that he felt that he was in danger.

We have nothing else but his testimony that is, quite frankly, that is just incredible. He is not a credible witness.²²

That same day, the district court entered a written order dismissing the case for "insufficient evidence." The People appealed this ruling to the Third Circuit Court. On May 29, 2015, Wayne County Circuit Court Judge Alexis Glendening, without granting oral argument,

¹⁹ PE, 26.

²⁰ PE, 28.

²¹ PE, 28.

²² PE, 29-30.

denied the People's appeal. The People filed a timely application for leave to appeal to the Court of Appeals. The People's application for leave to appeal was granted on December 22, 2015. The Court of Appeals, in a split decision, affirmed the district court in an unpublished decision dated November 29, 2016. The People filed a timely application for leave to appeal to this Court. In lieu of granting leave to appeal, the Court has directed the parties to file supplemental briefs addressing the following two topics: (1) the manner in which a magistrate judge may consider the credibility of witnesses at a preliminary examination when determining whether to bind over a defendant, in light of the instruction that a magistrate should not refuse to bind over a defendant when the evidence conflicts or raises a reasonable doubt; and (2) whether the Wayne County Circuit Court abused its discretion in dismissing the charges in this instance.²³

²³ Michigan Supreme Court order dated June 9, 2017.

ARGUMENT

- I. In considering the function of the district court at a preliminary examination, the Court has said both that the lower court should, and that it should not, decide the bindover motion based solely on witness credibility. The correct view is that the district court should only consider credibility when a witness's testimony either contradicts indisputable facts, or is so patently incredible or inherently implausible that it could not be believed by a reasonable juror. Therefore, this Court should grant leave to appeal in order to adopt a standard similar to the *Lemmon* standard but for preliminary examinations.**

Standard of Review

An appellate court reviews the district court's decision whether to bind a defendant over to circuit court for an abuse of discretion.²⁴ "[A] court 'by definition abuses its discretion when it makes an error of law.'"²⁵ An appellate court will also find an abuse of discretion where an unprejudiced person, considering the facts on which the court acted, would say there was no justification or excuse for the ruling,²⁶ or, stated otherwise, if the decision results in an outcome falling outside the principled range of outcomes.²⁷ A district court's factual determinations are reviewed for clear error.²⁸

²⁴ *People v Yost*, 468 Mich 122, 126 (2003); *People v Hudson*, 241 Mich App 268, 276 (2000).

²⁵ *People v Giovannini*, 271 Mich App 409, 417 (2006), quoting *Koon v United States*, 518 US 81 (1996).

²⁶ *People v Carlin (On Remand)*, 239 Mich App 49 (1999).

²⁷ *People v Babcock*, 469 Mich 247, 269 (2003).

²⁸ MCR 2.613(C).

Discussion

A. The District Court abused its discretion in dismissing the charges.

The District Court abused its discretion in failing to bind over the Defendant to Circuit Court as charged where the uncontradicted evidence showed that the Defendant pointed the gun at the victim and tried to shoot him.²⁹ The court erred as a matter of law in concluding that the Defendant's criminal acts were somehow excused because no gun was recovered and no shell casings were found at the scene.³⁰ The elements of the crimes (assault with intent to murder, felonious assault, carrying a concealed weapon, and felony firearm) were met by the victim's testimony. The elements of assault with intent to murder are: First, that the defendant tried to physically injure another person. Second, that when the defendant committed the assault, he or she had the ability to cause an injury, or at least believed that he or she had the ability. Third, that the defendant intended to kill the person that he or she assaulted, and the circumstances did not legally excuse or reduce the crime.³¹

²⁹ MCL 766.13 addresses the discharge of a defendant and bind over.

If the magistrate determines at the conclusion of the preliminary examination that a felony has not been committed or that there is not probable cause for charging the defendant with committing a felony, the magistrate shall either discharge the defendant or reduce the charge to an offense that is not a felony. If the magistrate determines at the conclusion of the preliminary examination that a felony has been committed and that there is probable cause for charging the defendant with committing a felony, the magistrate shall forthwith bind the defendant to appear within 14 days for arraignment before the circuit court of that county or the magistrate may conduct the circuit court arraignment as provided by court rule.

³⁰ PE, 30.

³¹ CJI2d 17.3.

In order to prove carrying a concealed weapon the prosecution must show that the defendant carried a dangerous weapon (a handgun) in a vehicle operated by the defendant.³² In order to prove the crime of felonious assault the prosecution must show that the defendant made an assault on the victim with a dangerous weapon.³³ And in order to prove felony firearm the prosecution would have to prove that the defendant possessed a handgun while he or she committed a felony.³⁴ Each of these crimes was proven under the probable cause standard by the victim's testimony that while the Defendant was driving with the victim seated in the passenger seat, the Defendant pointed a gun at the victim and tried to shoot him. Therefore, the case should have been bound over for trial.

B. There is no constitutional right to a preliminary examination; it is a statutory creation.

Since a preliminary examination hearing did not exist under the common law, there is no constitutional right to a preliminary examination. The right of an accused to a preliminary examination is dependent on its creation by either statute or a constitutional provision.³⁵ In Michigan, the right to a preliminary examination is created by statute. MCL 766.1 gives both the state and the accused the right to a prompt preliminary examination:

The state and the defendant are entitled to a prompt examination and determination by the examining magistrate in all criminal causes and it is the duty of all courts and public officers having duties to perform in connection with an examination, to bring it to a final determination without delay except as necessary to secure to the defendant a fair and impartial examination. A district court

³² MCL 750.227.

³³ MCL 750.82.

³⁴ MCL 780.227b.

³⁵ 21 Am Jur 2d, Criminal Law, §442; *Gerstein v Pugh et al.*, 420 US 103 (1975), holding that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended detention following arrest.

magistrate appointed under chapter 85 of the revised judicature act of 1961, 1961 PA 236, MCL 600.8501 to 600.8551, shall not preside at a preliminary examination or accept a plea of guilty or nolo contendere to an offense or impose a sentence except as otherwise authorized by section 8511(a), (b), or (c) of the revised judicature act of 1961, 1961 PA 236, MCL 600.8511.³⁶

MCL 766.4 requires a date be set for the preliminary examination not less than five days or more than seven days after the date of the probable cause conference and provides that the dates for the probable cause conference and the preliminary examination shall be set at the time of the arraignment on the warrant.

C. The purpose of the preliminary examination is not to resolve factual issues but to weed out groundless and unsupported charges.

The purpose of the preliminary examination is to determine whether there is probable cause to believe a crime has been committed and probable cause to believe that the defendant committed it, for the purpose of, as this Court put it, “weed[ing] out groundless or unsupported charges of grave offenses.....,” and also to protect the accused from hasty, improvident, or malicious prosecution.³⁷ Probable cause does not require proof beyond a reasonable doubt– the examining magistrate is to bind a defendant over for trial if it appears from the evidence, and all reasonable inferences drawn from that evidence, that there is probable cause to believe a crime has been committed and there is probable cause to believe the defendant committed it.³⁸

Therefore, it is *not* the function of the examining magistrate to weigh the evidence carefully and discharge the accused when the evidence conflicts or raises reasonable doubt as to

³⁶ MCL 766.1.

³⁷ *People v Duncan*, 338 Mich 489, 501 (1972).

³⁸ *People v Asta*, 337 Mich 590, 609 (1953); *People v Goecke*, 457 Mich 442, 469 (1998).

guilt, as these questions are solely for the trier of fact.³⁹ In order to determine a standard for when a magistrate may legitimately determine that the criminal charges are groundless or unsupported, or when there exists a duty to find probable cause to believe both that the offense occurred and that the defendant committed it so as to demand that the ultimate question of guilt or innocence be determined by a trier of fact at trial on the merits, the Michigan Supreme Court cases *People v Doss*⁴⁰ and *People v King*⁴¹ must be closely examined and, if possible, harmonized.

In the first case, *People v Doss*, a Detroit Police Officer was charged with manslaughter in connection with the shooting of a suspect at the scene of a breaking and entering, and after the preliminary examination was held and the defendant was bound over for trial, a motion to quash alleging an abuse of discretion on the part of the magistrate was denied by the circuit court.⁴² The Michigan Court of Appeals reversed, finding an abuse of discretion by the circuit court on the ground that, under the facts presented at the preliminary examination, self-defense was not negated and therefore the motion to quash should have been granted. This Court disagreed, reversing the Court of Appeals and upholding the examining magistrate.⁴³ The Court made the following pertinent observations:

The object of a preliminary examination is not to prove guilt or innocence beyond a reasonable doubt, nor should a magistrate discharge a defendant when evidence conflicts or raises reasonable doubt of his guilt; such questions should be left for the jury upon the trial.⁴⁴

³⁹ *Matter of Buckner*, 92 Mich App 119, 122-123 (1979).

⁴⁰ *People v Doss*, 406 Mich 90 (1979).

⁴¹ *People v King*, 412 Mich 145 (1981).

⁴² *People v Doss*, 406 Mich 90, 93 (1979).

⁴³ *People v Doss*, 406 Mich 90, 103 (1979).

⁴⁴ *Id.*(emphasis added).

The *Doss* Court also quoted from *People v Oster*,⁴⁵ that in order to bind a defendant over "positive proof of guilt is not required... there must be evidence on each element of the crime charged or evidence from which those elements may be inferred."⁴⁶ The Court concluded that the question of whether the force used by the defendant under the circumstances was excessive or not was "properly left for the jury."⁴⁷

In *People v King* (a 4-3 per curium opinion issued without briefing and argument, in lieu of granting leave to appeal), the defendant was charged with first-degree murder.⁴⁸ The deceased lived with the defendant's wife and children while a divorce was in progress. The defendant telephoned the deceased (after having consumed a considerable quantity of intoxicants) and made threatening remarks, to which the deceased responded with taunting remarks back to the defendant.⁴⁹ The defendant went to the residence armed with a pistol and the deceased attempted to block his entry into the house by leaning against the door.⁵⁰ The defendant shot through the door, killing the deceased. Testimony as to the defendant's drunken condition was offered. The defendant was bound over only on manslaughter. The People appealed, and the circuit court affirmed; however, the Court of Appeals reversed, finding an abuse of discretion on the part of the magistrate, *in that in the court's view the magistrate's inquiry should have stopped at the point at which some evidence on each element of the offense charged was presented.*⁵¹

This Court, in turn, reversed the Court of Appeals and upheld the magistrate's decision,

⁴⁵ *People v Oster*, 67 Mich App 490 (1976).

⁴⁶ *Id.* at 495.

⁴⁷ *People v Doss*, 406 Mich at 103.

⁴⁸ *People v King*, 412 Mich 145 (1981).

⁴⁹ *Id.* at 148.

⁵⁰ *Id.* at 149.

⁵¹ *People v King*, 412 Mich 145, 151 (1981)

finding that the Court of Appeals had too narrowly viewed the function of the magistrate at a preliminary examination, and held that it was the magistrate's duty to pass judgment on the weight and competency of the evidence, the credibility of the witnesses, and that the magistrate may consider evidence in defense.⁵² The magistrate, said the court, is not limited to whether evidence has been presented on each element of the offense, but must make its decision based on an "examination of the whole matter."⁵³ The court found in the case before it that under the circumstances there was an insufficient showing of malice and premeditation for murder. The court, however, also stated that the magistrate should not discharge (or reduce the charge) when "evidence *conflicts* or raises reasonable doubt of the defendant's guilt, since that *presents the classic issue for the trier of fact*."⁵⁴

On the surface, it appears that *People v Doss* and *People v King* are inconsistent, but *People v King* cites *People v Doss* with approval.⁵⁵ It is necessary, then, to reconcile the statement in *People v Doss* that to establish the offense "there must be evidence on each element of the crime charged or evidence from which those elements may be inferred," with that in *People v King*, that "the inquiry is not limited to whether the prosecution has presented some evidence on each element," but an examination of the "entire matter" is allowed, though a magistrate may *not* reduce or discharge simply because the evidence "conflicts or raises a reasonable doubt of the defendant's guilt, since that presents the classic issue for the trier of

⁵² *People v King*, 412 Mich 145, 154 (1981).

⁵³ *Id.*

⁵⁴ *Id.* (emphasis added).

⁵⁵ *Id.*, at 151.

fact.”⁵⁶

A standard must be discerned from these statements which permits the magistrate to refuse to bind over even though there is some evidence on each element, or evidence from which the elements may be inferred, but which prohibits the magistrate from refusing to bind over simply because the evidence conflicts or raises a possible reasonable doubt; in short, where it creates issues classically *resolved at trial*. From prior case law (e.g. *People v Duncan*)⁵⁷ and from *People v Doss* and *People v King*, the following rules can be deduced:

- 1) The purpose of examinations is to weed out groundless and unsupported charges.
- 2) In so doing, the magistrate may not determine the case as a factfinder at trial, and may not fail to bind over as charged simply because the evidence conflicts or a possible reasonable doubt exists; in short, when there are *triable issues of fact*.
- 3) In examining the whole matter, considering the weight of the evidence and its credibility, and considering evidence in defense (and/or mitigation) which is supplementary to, and not in conflict with, any prosecution evidence (such conflicts simply creating triable issues), the magistrate may reduce or discharge, even where there is some evidence on every element, only where in reviewing that evidence as a whole, *no reasonable person could find probable cause as to the demonstration of an element*.

D. The deference shown to the facts when ruling on a motion for a bindover is the same that should be shown at a motion for a directed verdict.

If a motion for directed verdict is made at trial, it can be presumed that the People have presented all of the legally admissible evidence available at the close of their proofs. The test on a defendant's motion for directed verdict is whether, when viewing the evidence and all reasonable inferences gleaned from the evidence in the light most favorable to the prosecution,

⁵⁶ *Id.* at 154, (emphasis added).

⁵⁷ *People v Duncan*, 388 Mich 489 (1972), overruled on other grounds, *People v Glass*, 464 Mich 266 (2001).

the evidence would allow a reasonable person to find guilt proven beyond a reasonable doubt.⁵⁸

Both the standard and the evidence are greater at trial when a motion for directed verdict is made than at the conclusion of a preliminary examination when a motion to bind over is made. In ruling on a motion for directed verdict the trial court must be mindful that it is for the jury to decide who to believe and what testimony of a particular witness to believe.⁵⁹ The reviewing court must examine the record in the light most favorable to the government, and it is not the reviewing court's prerogative to retry the case, weigh the evidence, or assess the credibility of witnesses.⁶⁰

Adoption and application of the directed verdict standard for use at the preliminary examination (geared to probable cause) is logically sound. There should be the same, if not more, deference given at the preliminary examination to the credibility-weighting function of the ultimate fact-finder than is given by a judge at trial on a motion for directed verdict after the People conclude their presentation of their proofs. At trial, a judge ruling on a directed-verdict motion is *not* completely free to resolve credibility issues and conflicts in evidence, but has only an extremely limited role.

When ruling on a motion for directed verdict, the trial judge must view the evidence and all reasonable inferences in the light most favorable to the prosecution to determine whether a reasonable person could find guilt beyond a reasonable doubt.⁶¹ Where a reasonable person *could* credit testimony showing guilt, or resolve a conflict in evidence in favor of guilt, the judge

⁵⁸ *People v Hampton*, 407 Mich 354 (1979); *Jackson v Virginia*, 443 US 307 (1979).

⁵⁹ *People v Bowyer*, 108 Mich App 517 (1981); *US v Carter*, 720 F 2d 941 (7th Cir. 1983).

⁶⁰ *People v Herbert*, 444 Mich 466 (1993).

⁶¹ *People v Hampton*, 407 Mich 354 (1979).

is required to let the case go to the jury. It is only, then, where no rational person could credit the testimony, that a judge has a “credibility-determining” role in ruling on a motion for directed verdict.

To give to the examining magistrate a credibility-determining role that is greater than that of the trial judge when ruling on a motion for directed verdict – where the function of a preliminary examination is to weed out groundless and unsupported charges – is simply illogical. The result would be cases being dismissed at the preliminary examination which could *not* be dismissed on a motion for directed verdict, an absurd result.

E. The examining magistrate must leave questions of fact for the jury and draw reasonable inferences favorable to the prosecution.

In *People v Yost*, one of the questions that this Court asked the parties to address was “what is the appropriate role of the magistrate at a preliminary examination in assessing the credibility of witnesses and how does that assessment affect the bindover decision.”⁶² Ultimately, although the Court acknowledged that there was tension between the authority of a magistrate to consider the credibility of witnesses and the principle that a magistrate should not refuse to bind over a defendant when the evidence merely conflicts or raises a reasonable doubt as to the defendant’s guilt, the Court found no need to clarify the interplay between those principles in its opinion.⁶³ In the instant case, however, there is a need to clarify the interplay between those principles, especially since the testimony of the victim was not met with any conflicting evidence at the preliminary examination and the reason that the examining magistrate

⁶² *People v Yost*, 468 Mich 122, 125 (2003).

⁶³ *Id.* at 128, fn 8.

doubted the testimony of the victim was based on a mistaken view of the evidence (that the victim was too concerned for his Christmas gifts to have been actually confronted with a gun).⁶⁴

In order to determine a standard for when a magistrate may legitimately determine that charges are groundless or unsupported, and when there exists a duty to find probable cause to believe both that the offense occurred and that the defendant committed it so as to demand that the ultimate question of guilt or innocence be determined by the trier of fact, credibility should only be considered to the extent that the evidence presented by the prosecution is, as a matter of law, incredible. Therefore, the magistrate should and must leave questions of fact for the jury, and the magistrate should draw inferences favorable to the prosecution. Doubts about the credibility of a witness do not and should not permit a magistrate to discharge the accused as long as the doubts expressed by the magistrate do not obviate a rational conclusion that there is probable cause to believe that the defendant committed the crime with which he or she is charged. Reconciliation of the case law mandates that the directed verdict standard be adopted and applied when weighing the credibility of a witness at the preliminary examination.

F. Several other states use a directed verdict standard for the preliminary examination.

The most common probable cause standard enunciated in other states that have probable cause hearings is the directed verdict standard.⁶⁵ For example, the standard in Massachusetts is

⁶⁴ The magistrate based her decision solely on her negative credibility evaluation of the victim's testimony which was based on the victim's "negotiating" with the Defendant over Christmas gifts. PE, 29-31.

⁶⁵ See, Frank Miller and the Decision to Prosecute, 69 Washington University Law Review 159. See also Graham & Letwin, The Preliminary Hearing in Los Angeles, 18 UCLA Law Review 636, and American Law Institute, A Model Code of Pre-Arrest Procedure (Tent. Draft No. 5 §330.5 (3) (Model Code).

the directed verdict rule. In *Myers v Commonwealth*,⁶⁶ the Supreme Judicial Court of Massachusetts held that a judge's task at a preliminary hearing is to determine whether the accused should be bound over for trial and that a defendant should be held for trial only if the examining magistrate finds that a crime has been committed and that there is probable cause to believe the prisoner is guilty. More importantly, the case further held that the directed verdict rule was to be applied to preliminary hearings – the examining magistrate should view the case as if it were a trial and he or she were required to rule on whether there was enough credible evidence to send the case to a jury.⁶⁷ The examining magistrate should dismiss the complaint when, on the evidence, the trial court would be bound to acquit as a matter of law.

In that case the defendant was charged with rape, assault with a dangerous weapon, and breaking and entering at night. At the preliminary examination the complainant was the only witness. As the defense began its cross-examination of the complainant, the judge said that he had heard enough and terminated the hearing, finding that there was probable cause to bind over the defendant for trial. In ruling that the defense has a statutory right to present evidence and cross-examine prosecution witness and remanding the case for a new preliminary examination, the Supreme Judicial Court reiterated that the directed verdict rule is to be applied in defining the minimum quantum of evidence necessary to bind over a defendant following a preliminary examination.⁶⁸

Kansas also has directed-verdict type of review for preliminary examinations. In *State v Wilson*, the defendant was charged with the sale of cocaine within 1000 feet of school property,

⁶⁶ *Myers v Commonwealth*, 363 Mass 843 (1973).

⁶⁷ *Id.* at 850.

⁶⁸ *Id.* at 858.

conspiracy to sell cocaine, and unlawful possession of drug proceeds.⁶⁹ At the preliminary examination a police officer with the drug task force testified as to her observations of the defendant selling the cocaine. There was a question as to the identification of the defendant since the officer was only sure of her identification after seeing a picture of the defendant three days after the drug buy. The examining magistrate viewed the in-court identification as inadequate and dismissed the case. The Supreme Court of Kansas reversed, finding that at a preliminary examination the court must draw all reasonable inferences favorable to the prosecution and probable cause signifies evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief in the defendant's guilt, and under the probable cause standard evidence to support guilt beyond a reasonable doubt is not required. If there is a conflict in the evidence that creates a question of fact for the jury, the preliminary hearing judge must accept the version of the testimony that is favorable to the state.⁷⁰

Similarly, *People v District Court of Colorado's Seventeenth Judicial District*⁷¹ held that an examining magistrate in Colorado is obligated to view the evidence in the light most favorable to the prosecution. In that case the examining magistrate refused to bind over the defendant on first degree murder and felony menacing, instead binding the defendant over on only second degree murder. The Supreme Court of Colorado held that the examining court is obligated to view the evidence in the light most favorable to the People at preliminary examination and the court may only consider the credibility of the witnesses if their testimony is implausible or incredible. Where there is a conflict in evidence, questions of fact must be left for

⁶⁹ *State v Wilson*, 267 Kan 530 (1999).

⁷⁰ *State v Wilson*, 267 Kan 530, 535 (1999).

⁷¹ *People v District Court*, 926 P 2d 567, 570 (Colo. 1996).

the jury to decide. In that case probable cause for first degree murder was established at the preliminary examination where there was evidence that the defendant fought with the victim, obtained a butcher knife, and stabbed the victim in the stomach twice, and the length of the struggle and the fact that the struggle moved from the living room to the kitchen could permit a reasonable inference that the defendant had adequate time to exercise premeditation before he stabbed the victim twice.⁷²

*Commonwealth v Marti*⁷³ held that in Pennsylvania, “inferences reasonably drawn from the evidence of record which would support a verdict of guilty are to be given effect, and the evidence must be read in the light most favorable to the Commonwealth’s case.”⁷⁴ In that case the defendant was charged with aggravated assault. In a fit of rage the defendant had lunged forward with closed fists and struck a police officer who was responding to a domestic violence dispute. The examining judge found that there was insufficient evidence of injury to the police officer, but the charge of aggravated assault only required an attempt to cause bodily injury. Therefore, under the applicable standard, where weight and credibility of the evidence are not factors, there was probable cause to find the defendant committed the charged offense and the case was reversed and remanded for trial.⁷⁵

In Wisconsin, although courts do not call it the “directed verdict” standard, the courts recognize that a preliminary examination is not a mini-trial on the facts, and is not a forum in which to choose between conflicting factors or influences, or to weigh the state’s evidence

⁷² *People v District Court of Colorado’s Seventeenth Judicial Dist.*, 926 P 2d 567, 571 (Colo. 1996).

⁷³ 779 A 2d 1177, 1180 (2001).

⁷⁴ *Commonwealth v Marti*, 779 A 2d 1177 (2001).

⁷⁵ *Id.*, at 1183.

against evidence favorable to the defendant.⁷⁶ *State v Hull* held that in a preliminary hearing to determine probable cause, the examining court is restricted from delving into witness credibility.⁷⁷ Additionally, Wisconsin has made clear that the question before the magistrate at a bind-over hearing is not which inference to draw, but whether, in the case of multiple possible inferences, any inference supports the conclusion that defendant probably committed a crime—and if any reasonable inference supports that conclusion, the magistrate must bind over the defendant.⁷⁸

Also, Nevada has held that when there is a conflict in evidence at the preliminary examination the magistrate must determine if an inference of criminal agency can be drawn from the evidence, thereby leaving the ultimate determination of which witness to believe to the jury. In *Wrenn v Sheriff, Clark County, Nevada*, the defendant was charged with open murder. The defendant filed a petition for writ of habeas corpus alleging that the evidence presented at the preliminary examination was insufficient to show that first-degree murder had been committed because he alleged there was no showing of malice aforethought because he fired the fatal shot accidentally. The evidence showed that the defendant first obtained a pistol but he found it to be unloaded so he obtained a rifle. The victim fled after the defendant fired two shots from the rifle and the third shot took effect, killing the victim. Therefore, even though there was some conflict in the evidence as to how the shots happened to be fired, there was no conflict that the defendant had possession of the weapon at the time the victim was killed. This was enough evidence to bind over the defendant for trial. As the Supreme Court of Nevada explained:

⁷⁶ *State v Schaefer*, 308 Wis 2d 279, 294 (2008).

⁷⁷ *State v Hull*, 363 Wis 2d 603 (2015).

⁷⁸ *State v Dunn*, 117 Wis 2d 487 (1984).

The accused's explanation of the homicide, being in the nature of a defense, whether true or false, reasonable or unreasonable, is for the trier of fact to consider at trial; and neither the preliminary examination nor the hearing upon a petition for habeas corpus is designed as a substitute for that function.⁷⁹

In Utah, the Utah Supreme Court has decided that the directed verdict standard should be used to evaluate the evidence at the preliminary examination – the evidence and all reasonable inferences therefore should be reviewed in the light most favorable to the state, and that the state must show probable cause.⁸⁰ In *State v Clark*, the defendant was charged with forgery for attempting to cash a stolen check at a bank. The checks had earlier been reported stolen by the owner. When the teller entered the account number into the computer he discovered that the check was stolen. When the teller refused to cash the check, the defendant left the check at the bank. The teller followed the defendant outside and wrote down the license plate number of the defendant's vehicle and called the police. A short time later, the defendant was arrested by police and identified by the bank teller. Although he was bound over following the preliminary examination, at the motion to quash, the district court judge decided that there was insufficient evidence that the defendant had the intent and knowledge to forge the check. The Supreme Court of Utah reversed, ruling that when the evidence was viewed in the light most favorable to the state, the state had shown probable cause.⁸¹

⁷⁹ *Wrenn v Sheriff, Clark County, Nevada*, 87 Nev 85; 482 P 2d 289 (1971).

⁸⁰ *State v Clark*, 20 P 3d 300 (Utah, 2001).

⁸¹ *Id.*, at 307.

G. The *Lemmon* standard informs the *Hampton* standard if there are credibility determinations to be made.

The *Hampton* standard, applied to preliminary examinations, would require district courts to draw all reasonable inferences in favor of the prosecution, and to bind over where the testimony supports a reasonable inference of guilt on all of the essential elements of the charged crimes.⁸² Under *Hampton*, only where the evidence offered is legally insufficient may a court deny the prosecution's bindover motion. And where a witness has testified as to the all the relevant elements, the evidence can be legally insufficient only if no reasonable juror could believe the witness's claims: That is, when the testimony is incredible as a matter of law.

The *Lemmon* standard determines whether testimony is incredible as a matter of law.⁸³ Specifically, the *Lemmon* standard states that "unless it can be said that directly contradictory testimony was so far impeached that it was deprived of all probative value or that the jury could not believe it, or contradicted indisputable physical facts or defied physical realities, the trial court must defer to the jury's determinations."⁸⁴ In the case of preliminary examinations, that rule would be modified to read that unless the testimony was so far deprived of any probative value that no reasonable juror could believe it, or contradicted indisputable physical facts or defied physical realities, the case should be bound over for trial. This standard would be

⁸² As an alternative to the directed verdict standard, the Court could hold that as long as there was any evidence presented by the People that would satisfy the elements of the crime charged then the examining magistrate should bind the defendant over for trial. This holding would reverse *People v King*, 412 Mich 145 (1981), and result in the examining magistrate making no credibility determinations whatsoever.

⁸³ *People v Lemmon*, 456 Mich 625 (1998).

⁸⁴ *People v Lemmon*, 456 Mich 625, 645-656 (internal quotation marks and citation omitted).

consistent with the standard used for trial testimony and would therefore ensure that victims have their day in court but also protect defendants from groundless and unsupported charges.

Several other states have adopted standards similar to the *Lemmon* standard for evaluating credibility in preliminary examinations. For example, in California, in *People v Bautista*, the court held that to reject the prosecution's evidence at the probable cause stage, either the evidence presented must be inherently implausible, the witness must be conclusively impeached, or the demeanor of the witness must be so poor that no reasonable person would find them credible.⁸⁵ Also, the court held that the appellate court should not substitute its own personal belief as to the ultimate determination to be made at trial for that of a reasonable person evaluating the evidence.⁸⁶

In Utah, the courts have also adopted a standard similar to the *Lemmon* standard for evaluating credibility in preliminary examinations:

[T]he magistrate's evaluation of credibility at a preliminary examination is limited to determining that "evidence is wholly lacking and incapable of reasonable inference to prove some issue which supports the prosecution's claim."

Essentially, magistrates may only disregard or discredit evidence that is "wholly lacking and incapable of" creating a reasonable inference regarding a portion of the prosecution's claim. It is inappropriate for a magistrate to weigh credible but conflicting evidence at a preliminary hearing as a preliminary hearing "is not a trial on the merits" but "a gateway to the finder of fact." Therefore, magistrates must leave all the weighing of credible but conflicting evidence to the trier of fact and must "view all evidence in the light most favorable to the prosecution, resolving all inferences in favor of the prosecution."

In sum, we hold that magistrates' ability to make credibility determinations is not limited to only disregarding testimony that cannot possibly be true. Rather although magistrates may not prefer one piece of credible evidence over a conflicting piece of credible evidence in making their bindover determination,

⁸⁵ *People v Bautista*, 223 Cal App 4th 1096 (2014).

⁸⁶ *Id.*, at 1102.

they may disregard or discount as incredible evidence that is not cable of supporting a reasonable belief as to an element of the prosecutor's claim. In other words, when evidence becomes so contradictory, inconsistent, or unbelievable that it is unreasonable to base belief of an element of the prosecutor's claim on that evidence, magistrates need not give credence to that evidence.⁸⁷

The state of North Dakota has made a similar holding as to the proper way for a magistrate to assess credibility at preliminary hearings. In *State v Blunt*, the court held as follows:

The district court's authority to assess credibility and make findings of fact must be viewed, however, in the context of the minimal burden of proof placed upon the State and the limited purpose of the preliminary hearing. The State is not required to prove with absolute certainty or beyond a reasonable doubt that a crime occurred, but rather need only produce sufficient evidence to satisfy the court that a crime has been committed and that the accused is probably guilty.

...

"We hold that a judge in a preliminary hearing has jurisdiction to consider the credibility of witnesses only when, *as a matter of law, the testimony is implausible or incredible*. When there is a mere conflict in the testimony, a question of fact exists for the jury, and the judge must draw the inference favorable to the prosecution."⁸⁸

Similarly, in Colorado, the standard for evaluating credibility in preliminary hearings is that the judge may not engage in credibility determinations unless the testimony is incredible as a matter of law.⁸⁹ Testimony is incredible as a matter of law if it is in conflict with nature or fully established or conceded facts. It is testimony as to facts which the witness physically could not have observed or events that could not have happened under the laws of nature.⁹⁰ Conversely, when there is a mere conflict in the testimony then it is not incredible as a matter of law and a

⁸⁷ *State v Virgin*, 137 P 3d 787, 793 (Utah, 2006), quoting *State v Pledger*, 896 P 2d 1226, 1229 (Utah, 1995), (emphasis supplied).

⁸⁸ *State v Blunt*, 751 NW 2d 692, 699 (ND 2008), quoting *Hunter v District Court*, 190 Colo 48, 53 (1975) (emphasis supplied).

⁸⁹ *People v Fry*, 92 P 3d 970, 977 (Colo. 2004).

⁹⁰ *Id.*, citing *People v Ramirez*, 30 P 3d 807, 809 (Colo. 2001).

question of fact exists for the jury and the examining judge must draw the inference favorable to the prosecution.⁹¹ Conflicts in the testimony of a complaining witness would not be sufficient to support the finding that the testimony was implausible or incredible as a matter of law.⁹²

Conclusion

In this case, the examining magistrate found only that it was strange that the victim was concerned about his Christmas gifts being left in the car.⁹³ The examining magistrate ignored the fact that this concern vanished once the Defendant attempted to pull the trigger and then began to shoot at the victim.⁹⁴ At that point, the victim ran away, abandoning the car and the gifts left inside.⁹⁵ Therefore, the examining magistrate's stated reason for doubting the victim was unfounded. Instead of allowing examining magistrates unfettered discretion to believe or disbelieve testimony based on specious reasons (as in this case), the better result is for the examining court to apply a standard akin to that enunciated in *People v Lemmon*,⁹⁶ which harmonizes *People v Doss*⁹⁷ with *People v King*,⁹⁸ properly restricting but not eliminating the magistrate's ability to assess witness credibility. Here, applying the *Lemmon* standard, the victim's testimony definitely did not contradict physical facts, nor was it so patently incredible or

⁹¹ *Id* at 809.

⁹² *Hunter v District Court*, 190 Colo 48, 53 (1975).

⁹³ PE, 29.

⁹⁴ PE, 14-15.

⁹⁵ PE, 17; 27.

⁹⁶ That is, the examining magistrate should evaluate credibility only to the extent that the testimony was so far impeached that it was deprived of all probative value or that it contradicted indisputable physical facts or defied physical realities. Otherwise, the examining magistrate should leave credibility determinations for the jury. Of course, the portion of the *Lemmon* opinion that grants a new trial to prevent a miscarriage of justice would not apply to preliminary examinations.

⁹⁷ *People v Doss*, 406 Mich 90 (1979).

⁹⁸ *People v King*, 412 Mich 145 (1981).

so inherently implausible that it could not be believed as a matter of law.⁹⁹ Therefore, the case should have been bound over for trial.

This Court should, therefore, grant the People's application for leave to appeal, clarify the standard of review as it relates to credibility determinations made by examining magistrates, or in the alternative, peremptorily reverse the district court's order dismissing the case for the reasons stated in Judge Saad's dissenting opinion,¹⁰⁰ and remand the case to the circuit court for trial.

⁹⁹ *Id.*

¹⁰⁰ *People v Tremel Anderson*, unpublished COA opinion No. 327905, November 29, 2016, attached as Appendix A.

- II. The court rules dictate that the circuit court has jurisdiction over an appeal as of right filed by the prosecution from a final judgment of the district court and therefore the court does not have the discretion to deny leave to appeal. Here, the circuit court denied the People's appeal via an order without providing an oral or written opinion. Therefore, because the circuit court did not follow the applicable court rule, the court abused its discretion in simply dismissing the People's appeal.**

Standard of Review

A district court's ruling that alleged criminal conduct does not fall within the scope of the criminal law is reviewed de novo for error but a decision not to bind over a defendant based on the sufficiency of the evidence is reviewed for an abuse of discretion.¹⁰¹

Discussion

The circuit court abused its discretion in dismissing the charges in this instance. The circuit court did not use the proper procedure for reviewing an appeal of right. The circuit court treated the People's appeal of the bindover decision as a motion, and simply issued an order denying it.¹⁰² But MCR 7.103(A)(1) provides that an appeal from the final order of the district court to the circuit court is an appeal as of right, not merely a motion. Further, MCR 7.114(B) provides that the circuit "court shall decide the appeal by oral or written opinion and issue an order. The court's order is its judgment." Here, the circuit court did not issue an opinion in any format, but simply denied the People's appeal, mistakenly treating it as a motion.

Had the circuit court properly reviewed the People's appeal, the court would have seen that the magistrate abused her discretion in dismissing the charges against the Defendant. The magistrate dismissed the charges because she did not feel that the victim was credible, based

¹⁰¹ *People v Henderson*, 282 Mich App 307, 312 (2009).

¹⁰² See Circuit Court order dated May 29, 2015.

mainly on the victim's concern for his Christmas gifts left in the Defendant's car. But as the Court of Appeals dissent pointed out, the victim's concern for his Christmas gifts completely disappeared after the Defendant tried to shoot the handgun that she had hidden between her legs. At that point the victim ran away, abandoning the vehicle and the gifts, and ran away across the street to hide behind a store.¹⁰³ Therefore, the district court was incorrect in its assessment of the situation, and therefore, abused its discretion when it failed to bind over the Defendant for trial. The examining judge did not point to any inconsistencies in the victim's account, nor any history of false accusations. The examining judge failed to point to any objective facts when ruling on the victim's credibility. Thus, the examining judge usurped the role of the jury and inserted herself as the final trier of fact thereby denying the victim a chance of justice in the criminal justice system. This was a classic example of an abuse of discretion and the circuit court should have so ruled.

¹⁰³ PE, 27.

RELIEF REQUESTED

WHEREFORE, The People of the State of Michigan respectfully request this Honorable Court grant the People's application for leave to appeal, or in the alternative peremptorily reverse the decision of the district court and remand the case for trial in Circuit Court.

Respectfully submitted,

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Appendix A

People v Tremel Anderson,
Unpublished COA Decision, No. 327905,
Decided November 29, 2016.